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OFFICE OF PETITIONS

In re Application of	:	
Hammer, et al.	:	
Application No. 10/535,132	:	ON PETITION
Filed: December 13, 2005	:	
Attorney Docket No. 10191/4227	:	

This is a decision on the petition to revive under 37 CFR 1.137(a),
filed January 30, 2008.

The petition under 37 CFR 1.137(a) is **GRANTED**.

The above-identified application was held abandoned for failure to pay the issue fee in response to the Notice of Allowance mailed July 9, 2007. This Notice set a statutory period for reply of three (3) months. No issue fee having been received, the application became abandoned on October 10, 2007. A Notice of Abandonment was mailed on November 2, 2007.

A grantable petition under 37 CFR 1.137(a) must be accompanied by: (1) the required reply, unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(l); (3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(d). Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable:

The word 'unavoidable' . . . is applicable to ordinary human affairs, and requires no more or greater care or diligence

than is generally used and observed by prudent and careful men in relation to their most important business. It permits them in the exercise of this care to rely upon the ordinary and trustworthy agencies of mail and telegraph, worthy and reliable employees, and such other means and instrumentalities as are usually employed in such important business. If unexpectedly, or through the unforeseen fault or imperfection of these agencies and instrumentalities, there occurs a failure, it may properly be said to be unavoidable, all other conditions of promptness in its rectification being present.¹

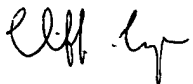
Moreover, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was "unavoidable."²

Petitioner argues that he never received the Notice of Allowance mailed July 9, 2007. With the instant petition, petitioner has satisfied the requirements to establish non-receipt of an Office action. In particular, petitioner has submitted a copy of a docket report showing all incoming mail from the period from July 2, 2007 to August 31, 2007. In addition, petitioner has submitted a copy of a log showing all issue fees docketed for the period from July 1, 2007 to October 31, 2007. An entry for the instant application is absent in both reports, supporting the conclusion that the Notice of Allowance was not received.

In view of the above, it is concluded that petitioner has met his burden of establishing that the delay was unavoidable.

The application is being forwarded to the Office of Patent Publication for processing into a patent.

Telephone inquiries concerning this decision should be directed to the undersigned at (571)272-3207.



Cliff Congo
Petitions Attorney
Office of Petitions

¹ In re Mattullath, 38 App. D.C. 497, 514-15 (1912) (quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 USPQ 666, 167-68 (D.D.C. 1963), aff'd, 143 USPQ 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913).

² Haines v. Quiqg, 673 F. Supp. 314, 316-17, 5 USPQ2d 1130, 1131-32 (N.D. Ind. 1987).